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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT INTERIM OPINION  
ON THE DRAFT CONSTITUTIONAL AMENDMENTS  
ON THE JUDICIARY**

**OF ALBANIA**

**on the basis of comments by**

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## INTRODUCTION

1. On 1 October 2015 Mr Xhafaj, the Chairman of the *Ad hoc* Committee on Justice System Reform of the Albanian Parliament requested an opinion of the Venice Commission on the Draft Amendments to the Constitution of Albania (CDL-REF(2015)037, hereinafter “the Draft Amendments”). The Draft Amendments have been prepared by the High Level Experts Group, which had been established by the *Ad hoc* Committee. On 5 October 2015 Mr Meta, the Speaker of the Albanian Parliament, wrote a letter in similar terms to the Venice Commission confirming the request for an opinion on the Draft Amendments.
2. Mr S. Bartole, Ms H. Suchocka, Mr J. Hamilton and Mr K. Vardzelashvili acted as rapporteurs on behalf of the Venice Commission. On 2<sup>nd</sup> and 3<sup>rd</sup> November 2015 a delegation of the Venice Commission visited Tirana and met with the State officials and politicians concerned, as well as with the judges, prosecutors, members of the civil society and of the expert community. The delegation is grateful for the good organisation of the visit to the country and very useful exchanges it had there.
3. This Opinion is based on the English translation of the Draft Amendments provided by the *Ad hoc* Committee. The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.
4. The present opinion focuses primarily on the text submitted by the *Ad hoc* Parliamentary Committee. During consultations in Tirana representatives of the other political forces complained that the Draft Amendments had been prepared without their genuine participation. The Democratic Party and the Socialist Movement for Integration produced their own comments on the Draft Amendments (see CDL-REF(2015)043 and CDL-REF(2015)044). Those documents have been carefully studied and taken into account by the rapporteurs in the preparation of the present opinion.
5. Finally, given the scale of the constitutional reform, in view of the urgency of the matter, and following consultations with the Albanian authorities it was agreed that the opinion will only deal with certain most critical points of the reform and will be an interim opinion. Once the Draft Amendments are reviewed in the light of recommendations contained in the interim opinion (see below), the Venice Commission will prepare a final opinion on the revised text.
6. *This Interim Opinion was adopted by the Venice Commission at its ... Plenary Session (...)*

## I. GENERAL REMARKS

7. The Draft Amendments cover several areas: European integration, functioning of the Constitutional Court, organisation of the judiciary and of the prosecution service. However, it is clear that the amendments are mostly inspired by the need to ensure the integrity of Albanian judges. Therefore, the present interim opinion will mostly focus on this aspect of the Draft Amendments.
8. The current Albanian Constitution of 1998 was prepared in close cooperation with the Venice Commission;<sup>1</sup> the existing constitutional arrangements defining the status of the judiciary are in theory sufficient to guarantee its independence and accountability. However, in Albania, as well as in some other post-communist countries, the constitutionalisation of the standards on the

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<sup>1</sup> See, for example, CDL-INF(1998)009, the Venice Commission Opinion on Recent Amendments to the Law on Major Constitutional Provisions of the Republic of Albania

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independence of the judiciary resulted in a paradox: constitutional guarantees have been bestowed upon judges who were not yet independent and impartial in practice. As a result, in the opinion of Albanian politicians and of the general public, many members of the judiciary developed corporatist attitudes which led to wide-spread corruption and lack of professionalism and efficiency. In these circumstances the initiative to revise the constitutional provisions on the judiciary is perfectly understandable.

9. This paradox explains the overall design of the reform. In essence, the Draft Amendments (insofar as they concern the reform of the judiciary) are composed of two major parts. First, they propose a new *permanent* institutional arrangement for the judiciary and the prosecution service. Second, the Draft Amendments introduce a *temporary* mechanism, described in the Annex, supposed to cleanse the ranks of the judiciary/prosecution and “reboot” the whole system. This temporary mechanism involves international experts, nominated by foreign powers and supposed to control the whole process of the vetting of the sitting judges and prosecutors.

10. The goal pursued by the reform is commendable; however, the organizational choices proposed by the Draft Amendments appear to be too cumbersome, and the reform is likely to lead to a quite complex decision-making process, with many bodies controlling each other in a complicated system of checks and balances.

11. The next observation concerns the level of details in the Draft Amendments: the text appears to be very specific, especially as regards the Annex describing the vetting process. During the consultations in Tirana members of the high-level expert team suggested the possibility of regulating certain details at the legislative level (probably by an organic law and a simple law). This could be a very wise move as far as it will allow in the future a more flexible revision of the detailed regulations of the matter when necessary.

## II. ANALYSIS

### A. European integration and international law

12. Articles 1 to 13 of the Draft Amendments deal with the possible accession of Albania to the European Union. At present, their introduction in the text of the Constitution has evidently a political relevance only. However, the draft reads as though Albania was already a member of the European Union. All that is needed is to make whatever changes are required to enable the accession to the European Union without any further constitutional change. If the Albanian legislator insists on including certain provisions now (in order not to change the Constitution again in future), the text should make it clear that the relevant provisions enter into force only when Albania joins the Union.

13. Certain provisions of the Draft Amendments are welcome (such as the reference to the “European values” in the Preamble, addition of sexual orientation as a prohibited ground of discrimination to Article 18 of the existing Constitution,<sup>2</sup> giving right to the EU citizens to vote in the EU elections in Article 9, supplementing the existing Article 109).

14. The proposed amendment to article 2 of the Constitution seems rather unclear. What is meant by “state powers” exercised jointly with other member States of the EU? It seems that what is referred to in this provisions are the powers which its member states have conferred on

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<sup>2</sup> It may also be advised to extend the list of prohibited grounds for discrimination by referring to “gender identity” It is also recommended to make an open list of grounds or possibly rephrase the article in accordance with Article 14 of the ECHR and Article 26 of the ICCPR by referring to “other opinion”, “social origin, property, birth or other status”, etc.

the European Union but, if so, it is not appropriate to refer to them as “state” powers. At present, a simple statement to the effect that Albania may join the EU and transfer some of its sovereign powers to the EU would probably be sufficient<sup>3</sup>. If necessary, this provision might also set out what conditions would be required for a decision to join the Union (for example, a requirement of a qualified majority in the Parliament).

15. Article 3 (amending Article 12 of the Constitution) regulates the deployment of foreign forces on the Albanian territory and the dispatch of Albanian military forces abroad. It would rather be advisable to entrust the Parliament and not the Government with the task of deciding on the strategic issues related to the international military cooperation (an exception for cases of emergency might be made). The Venice Commission recalls that in its Report on the democratic control of armed forces it observed that “there is general consensus as to the paramount role of Parliament in the execution of these controlling functions over security and defence”<sup>4</sup>. If there is a framework international agreement ratified by the Parliament on military cooperation of Albania with other countries, the Government may decide on the modalities of such cooperation, but the mandate given by the Parliament to the Government should be fairly specific, well-defined by the law, and the exercise of the Government’s powers in this field should be based on the principle of “loyal collaboration between the powers of the State”.<sup>5</sup>

16. Article 6 (Amending Article 43) give everyone the right of “file a complaint” against a judicial decision “provided in case the court decision is final”. This phrase is unclear and, unless it is a problem of translation, it should be reformulated. Most probably the right to “file a complaint” should be understood as a right to appeal judicial decision. It is important to have this right guaranteed in the Constitution. However, it may be advised to clarify whether the Constitution guarantee an ordinary appeal or cassation appeal as well. Furthermore, the phrase “provided in case the court decision is final” may be misleading. Whilst there should be a right to appeal against criminal convictions (with certain exceptions – see Article 2 of Protocol no. 7 to the European Convention on Human Rights, the ECHR)<sup>6</sup>, there should be finality in every court system. The system of appeals should not allow for interminable reviews of “final” judgements, and the legislation should define clearly the moment when the court decisions become “final” and hence not subject to any further review.<sup>7</sup>

17. Article 7 should specify that election of the Albanian representatives to the European Parliament will be regulated by the relevant law. Article 9 is understood as proclaiming that citizens of the EU residing permanently in Albania acquire active as well as passive electoral right.

## **B. Constitutional Court**

18. Some of the proposals touching upon the Constitutional Court (CC), such as the requirement of a separate and independently administered budget, election of the Chairperson by his/her peers, functional immunity of the CC judges, extending the list of persons who may appeal to the CC etc. are welcome.<sup>8</sup> The main criticism issues are as follows.

<sup>3</sup> For more details on constitutional provisions regulating relations between the EU and its member State see CDL-AD(2014)010, Opinion on the Draft Law on the Review of the Constitution of Romania, §§ 128 and 129

<sup>4</sup> CDL-AD(2008)004, § 153

<sup>5</sup> CDL-AD(2014)010, cited above, §§ 105 and 109.

<sup>6</sup> “Right of appeal in criminal matters”: “1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. [...] 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal”.

<sup>7</sup> See the ECtHR judgement in the case of *Brumărescu v. Romania* [GC], no. 28342/95, §§61 et seq., ECHR 1999-VII

<sup>8</sup> In order to strengthen further the independence of the Constitutional Court, it may be advisable to allow the CC to have a say not only in the execution of the budget but also in the budget planning process. Furthermore, the Constitution

19. Article 12 (supplementing Article 131) provides that the CC cannot declare unconstitutional a law approved by Assembly to the effect of revising the Constitution.<sup>9</sup> The current text of Article 131 of the Constitution does not seem to suggest that the CC has a power to assess the compatibility of the amendment introduced to the Constitution; however, it is not directly prohibited either. The amendment is thus aimed at putting an explicit restriction to the scope of the CC's powers in this field.

20. The power of the Courts to review and invalidate part of the Constitution itself is a controversial and extremely complex issue, especially when the Constitution does not contain so-called "eternal clauses". In its opinion on Ukraine the Venice Commission stated that there is no generally accepted standard in comparative constitutional law regarding the participation of constitutional courts in the constitutional amendment process.<sup>10</sup> In its recent Report on Constitutional Amendment<sup>11</sup> the Venice Commission noted that while some European countries explicitly provide for such a possibility,<sup>12</sup> the *posterior* judicial review of adopted constitutional amendments is a relatively rare procedural mechanism. In some countries, judicial review of constitutional amendments is in theory possible, but has never been applied in practice<sup>13</sup>. In others, it has been rejected on the basis that the courts as state organs cannot place themselves above the constitutional legislator acting as constitutional power. A system which has firmly rejected judicial review of constitutional amendments is the French system, under which this is not considered within the competence of the *Conseil Constitutionnel* (or any other court), because the constitutional legislator is sovereign, therefore constitutional amendments cannot be subject to review by other bodies (themselves created by the Constitution).<sup>14</sup> An alternative approach was taken by the Austrian Constitutional Court which regarded the fundamental principles of the Constitution as *de facto* un-amendable (or rather amendable only through the referendum).

21. That being said, it would be possible to give to the CC at least the power to verify the *procedure* in which the constitutional amendments are adopted (as opposed to the *substance* of the amendments). After all, the Draft Amendments do not touch upon the power of the CC to examine the constitutionality of a referendum (see Article 131 (ë) of the current Constitution), including the referendum on changing the Constitution. In any event, when the Constitution is so detailed and encompasses issues which should normally be regulated at the legislative level, the role of the CC is already quite limited. In case if CC is empowered to evaluate the issue of procedure of constitutional amendments, there will be a need for more detailed regulations, for instance, such as time-limits for lodging such complaints, who is entitled to bring them etc.

22. Article 14 (supplementing Article 124) may be interpreted as implying that all questions concerning "the observation of the Constitution" are dealt with by the CC, whose interpretation of the Constitution is final (the current text contains the same formula). But this is true only with regard to the questions which are submitted to the CC. In many cases a final decision will be adopted by an ordinary judge (or even by an administrative body), and will never be challenged

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and/or the law must establish a rule that will allow decreasing the budget of the Court without the consent of the Court only in exceptional circumstances and proportionally with the budget decrease for other State agencies.

<sup>9</sup> Formally, Article 131 has no paragraph 1, there are 9 sub-paragraphs in the Article 131, which list competences of the Constitutional Court. Therefore, the amendment should be made to the entire article, firstly by creating paragraph 1 with the relevant sub-paragraphs and then if needed adding paragraph 2

<sup>10</sup> CDL-AD(2010)044, Opinion on the Constitutional Situation in Ukraine

<sup>11</sup> CDL-AD(2010)001

<sup>12</sup> See, for example, Germany, Bulgaria, Romania or Turkey (cf. CDL-AD(2010)001, § 230)

<sup>13</sup> For example, Norway

<sup>14</sup> f. the French Constitutional Council No 92 – 312 of 2 September 1992, § 34: "*Considérant que, dans les limites précédemment indiquées, le pouvoir constituant est souverain ; qu'il lui est loisible d'abroger, de modifier ou de compléter des dispositions de valeur constitutionnelle dans la forme qu'il estime appropriée*"

before the CC. Observance of the Constitution is the duty of all elements of the State machinery, the CC being simply the highest level for settling disputes which have a constitutional dimension and which reached this level.

23. Article 15 (amending Article 125) deals with the composition of the CC. Under the proposed new system three members will be elected by the President, three by the Assembly, and three by the High Court and the High Administrative Court acting together.<sup>15</sup> Thus, it is planned to introduce a model existing in many Eastern European States where the President, the legislator and the judiciary participate in composition of CC. The President and the Assembly must choose from a list provided by the Justice Appointments Council (JAC), where judges play a decisive role. In principles this is a positive change as it limits the scope for political manipulations and thus should be welcomed.

24. The mandate of CC judges is now to be for 12 years with one third of the appointments renewed every four years. Presumably it is intended that each four years the President, the Assembly and the judges will each choose one person although this is not in fact specified in the constitutional amendment. This rotation may have the effect of reducing the risk of one faction dominating the CC since it is more likely that two three-year cycles will occur during the course of any single political term of office<sup>16</sup> than that two four-year cycles will occur. Article 57 of the Draft Amendments contains a transitional provision under which three members will come up for renewal in 2026, one vacancy to be filled by the President, one by the Assembly and one by the courts, but four will be due for renewal in 2030 and only two in 2034. The transitional provision is therefore inconsistent with the terms of article 15 of the draft and needs to be adjusted.

25. Draft Article 125 further provides that the members selected to sit on the Court “shall not have been involved in the leading forums of the political parties”. It is not clear what precisely is meant by this expression. The wording of this provision requires revision in order to avoid ambiguity and overbroad application of the restriction. In particular, the words “leading forums” seems to be ambiguous. Furthermore, as a method of preventing political influence in the Court it is likely to prove of limited effectiveness: in most systems it is common to find persons whose sympathies are well known but who have never formally been a member of the political party which they are known to support. In addition, it seems wrong that a person who has engaged in political activity is forever barred from certain other activities. Finally, political activity should not be seen as something intrinsically suspect. The problem lies rather in the direct transition from one activity to the other as well as the advantage given to the political activist where the appointment is made through the political process. The model which the Draft Amendments apply to the candidates to the position of the Prosecutor General (not to have a political post or a post in a political party for the past 10 years) seems more reasonable. In any event, exclusion of candidates simply *associated* with political groups or due to their political activity (as opposed to formal membership) is over exclusive.

26. Finally, paragraph 5 of this Article stipulates that “the Constitutional Court judge shall continue to stay in office until the appointment of his successor.” It would be recommended to also to allow judges to stay in office until the accomplishment of the case in which they started to participate before the end of their term.

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<sup>15</sup> Presumably, the law on the appointment procedure will regulate in more detailed manner the rules and procedures of election of three judges by the meeting of the two courts. It should ensure that the regulations avoid possible deadlock if two courts disagree on a candidate.

<sup>16</sup> The Parliament is elected every four years (Article 65 of the Constitution); the President is elected for 5 years with the possibility of one re-election.

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27. Article 17 and 18 of the Draft Amendments (amending Articles 127 and 128) propose changes in relation to the termination of the mandate of the CC judge. The existing provision for termination in the case of a judge who fails to exercise his duties without reason for more than six months is to be removed. It is not clear why this change is being made as this does not seem an unreasonable basis for the termination of the mandate. As regards removal of the CC judges for a disciplinary offence, it needs to be clarified what disciplinary offence is to be regarded as sufficiently serious to give grounds for a dismissal from office. Not every disciplinary breach should entail the removal from office. Finally, this Article should include possibility of suspension of a CC judge from office in the event of his/her being charged with a serious crime. This comment applies not only to the CC judges but to all other office-holders who are subjected to disciplinary liability. More generally, the Draft Amendments are silent on the procedures to be followed when considering dismissal, and on the rights to be afforded to the judges and other office-holders threatened with dismissal. While one should not expect a detailed code to be contained in the Constitution, a general statement of broad principle would be appropriate.

28. Article 17 (amending Article 127) introduces, as a ground for termination of to the office of the CC judge, “a final decision in a disciplinary procedure”. The Draft Amendments contain no clear indication on who is to decide on disciplinary measures against the CC judges. Under draft Article 147/a the power of the High Judicial Council to decide on disciplinary measures against judges expressly excludes CC judges from its scope (see also the draft Article 147/ç). Article 127 § 2 suggests that “the end of the mandate of the Constitutional Court member shall be declared upon the decision of the Constitutional Court”. Probably, the best solution would be to indicate clearly that the power to decide on disciplinary sanctions against the CC judges belongs to the CC itself. This Article should also clarify that that the dismissal may only follow in cases of a serious misconduct by a CC judge.

29. According to Article 21 (introducing amendments to Article 130 of the Constitution), the position of the CC judge “is incompatible with any other compensated professional activity, unless otherwise provided by law”. In addition to a prohibition on “compensated professional activity” for the CC judges, which seems appropriate, this Article should maintain the existing prohibition on political activity, whether compensated or not. Furthermore, it is recommended to clarify at least what sort of exceptions from the general rule may be allowed by the law, rather than giving almost unlimited discretion to the legislator.

30. Article 22 (amending article 131) proposes to change the wording which provides for the jurisdiction of the CC in relation to the adjudication of individual complaints for violation of constitutional rights. In the current text the CC competence was limited to “the final adjudication of the complaints of individuals for the violation of their constitutional rights to due process of law”. If the intention of the drafters is to extend the CC competence to the complaints related to other basic rights and freedoms, it should be welcome.<sup>17</sup>

31. However, this Article speaks of the exhaustion of all legal remedies as a pre-condition for admissibility of an individual complaint to the CC (it is the current text as well). This is not very precise, since under the case-law of the European Court of Human Rights (ECtHR), individual applicants should only exhaust “effective”<sup>18</sup> domestic remedies before bringing the case to Strasbourg. It is also not clear what are the remedies besides judicial one that need to be exhausted in order to apply to the CC. Probably, domestic constitutional courts could apply a rule developed in the ECtHR case-law – only “effective” domestic remedies, capable of bringing

<sup>17</sup> See CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of “the former Yugoslav Republic of Macedonia” concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, §79

<sup>18</sup> See, for example, *Sejdovic v. Italy* [GC] (no. 56581/00, ECHR 2006-II), §45



the relief sought, should be exhausted before the complaint is brought before the CC. If this is not the case, the CC itself risks not to be regarded as an “effective remedy”. Hence, Article 22 should be interpreted in compliance with the ECtHR approach.

32. Article 24 (amending Article 132) proposes some changes in the effect of the CC decisions. Unless it is a problem of translation, it seems unclear what the intention behind these changes is. Under the present text the CC decisions have “general binding force”; the word “general” is now to be removed. Are decisions to bind only the parties to the case in future? The Venice Commission recommends that the decisions of the CC have a wider effect; it recalls that “a typical attribute of constitutional courts, following the European model, is the *erga omnes* effect of their decisions”.<sup>19</sup> Furthermore, Article 24 does not explain whether the publication of the minority’s opinion is mandatory or depends on the choice of the members of the minority.

33. This Article 24 also stipulates that “unless otherwise provided by the law<sup>20</sup>, the decisions of the Constitutional Court shall, normally, enter in force on the day of their publication [...]. The Constitutional Court may decide that the law or any other normative act be repealed on another date”. As far as the powers of the CC are expanded (see 131 (f)) it may seem more appropriate to substitute the words “the law or any other normative act” with reference to “any acts reviewed by the CC”. With an aim to increase effectiveness of the constitutional review, the CC may also have a power to order suspension of the application of the repealed normative act with regard to the litigant in case, even if it decides to postpone the annulment of the act.

34. Article 25 (referring to Article 133 which is left intact) implies that the admissibility of constitutional complaints may to be determined not by the full Court but by a smaller formation defined in the law. This is a permissible solution helping to manage the docket; however, the current p. 2 of article 133 (that all the decisions are taken by the majority of the Court’s members) may create a different impression, so it is proposed to reformulate this Article in order to allow for creation of a “filtering mechanism” within the CC.

35. Under Article 26 (amending Article 134) the Ombudsman, as well as other State bodies, “may file a request only regarding the issues connected to their interests.” It is advisable to allow the Ombudsman to have the power of lodging *actio popularis* in all cases (provided that it is compatible in principle with his/her mandate).

## **C. Reform of the judiciary and of the prosecution service**

### **1. High Court and the High Administrative Court**

36. Article 27 (amending Article 135 of the Constitution) deals with the judicial power and the organisation of the courts. The main change is the creation of a new High Administrative Court (HAC). This change may have certain positive effect: as any specialisation, it will increase professionalism of judges examining administrative cases. In its opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary<sup>21</sup> the Venice Commission supported the idea to create separate administrative courts:

<sup>19</sup> CDL-AD(2010)039rev, Study on individual access to constitutional justice - Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), §167

<sup>20</sup> It is questionable whether the legislator should be given the power to decide “by law” on the date of the effect of the judgments of the Constitutional Court, since it may deprive those judgments of any useful effect. The decision as to the effect of the judgment *ratione temporis* should belong to the Constitutional Court itself.

<sup>21</sup> CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary, as proposed by the Working Group of the Constitutional Commission

*“21. The constitutional entrenchment of administrative courts [...], which already exist in Ukraine, is also welcome. From a human rights perspective, administrative justice is an important element in the process of control over the performance of public administration.”*

37. That being said, it is unclear whether Albania has the necessary human and financial resources to establish a new *high* court, in addition to the lower-level specialised courts, especially given that the system of the lower-level administrative courts has only been introduced few years ago and, in addition, the Albanian Parliament has already experienced difficulties with filling the vacancies in the already existing High Court.

38. In addition, if two different High Courts with equal standing are created, there is a risk of jurisdictional disputes between them. Under Article 23 (adding pp. (g) to the existing Article 131), it will be up to the CC to settle “material and functional power disputes” between those two courts. This provision, however, is not entirely clear. First of all, the Venice Commission has certain reservations regarding the involvement of the CC in the administration of justice in the courts of general jurisdictions. Second, it is unclear what sort of disputes the CC is supposed to solve. Two courts may disagree as to which of them should hear a particular case, but there are other sorts of conflicts, namely where the two branches of the judiciary do not dispute jurisdiction over a particular case but apply essentially the same legal provisions differently and develop diverse approaches in their case-law. While the Constitutional Court might solve direct jurisdictional disputes between the two courts, it certainly should not enter into the merits of the cases.

39. Furthermore, a new provision states that the administrative adjudication is to be organised in two instances encompassing the Administrative Court of First Instance and the High Administrative Court. It seems not very logical to refer expressly to a named first instance court in relation to the administrative law when in the previous paragraph the Constitution provides that first instance courts shall be set up by law. One is left wondering whether the arrangements for the establishment of first instance courts in relation to administrative law could in future be changed by an organic law or would require a change to the Constitution. It would be preferable if the rules in the Constitution concerning the administrative courts mirror those concerning the ordinary courts, i.e. to make a specific reference to named courts only in relation to the higher courts leaving it to organic law to organise all courts of first and second instances. A similar point arises in relation to a later reference to the Anti-Corruption Court of First Instance named though not apparently intended to be established in proposed new article 148/c.

40. Article 27 (amending Article 135) speaks of the specialised courts, but does not name them and does not specify whether they are to be created by an organic or ordinary law. This Article also removes an earlier provision allowing for the creation of courts of local jurisdiction; it might be wiser to leave this provision in place along with the reference to specialised courts as specialisation and local jurisdiction are not the same thing and it would seem sensible to allow for the creation of either in the future without having to amend the Constitution again. In addition, special anti-corruption courts (mentioned in Article 53 of the Draft Amendments adding Article 148/c to the current Constitution) might be explicitly mentioned as one particular type of the “specialised courts”.

41. According to the Article 31 (amending Article 139) the mandate of High Court or High Administrative Court judge shall end upon reaching the age of 65 years (sub-para “a”). For CC judges the age is 70 years. It is not entirely clear what accounts for this difference. The draft sub-para “b” stipulates that term of office will also expire after the end of the 12 years’ mandate. In both cases reaching the age-limit as well as the completion of the 12 years’ term should not necessarily result in an immediate termination of a mandate; the legislator may consider whether it is possible that the judge concerned ends consideration of a particular case in which s/he was involved as a rapporteur, for example.

42. Article 34 (amending Article 141) implies that the High Court will not anymore have the competency of the first-instance court in cases concerning high State officials, but will only act as a court of cassation and examine appeals on the points of law. Given the involvement of the politicians in the election of the judges of this Court the proposed solution appears sound, but the question remains which court will hear cases where the highest State officials are accused.<sup>22</sup>

43. Article 34 further provides that the HC and the HAC should not hear cases falling under jurisdiction of the CC. Indeed, there is a certain category of disputes in which the CC has exclusive jurisdiction. However, since the Constitution provides for the right of individual petition to the CC, most often the CC would examine the very same cases which have already been examined by the ordinary or administrative courts. This Article should therefore be reformulated.

## **2. Appointment of judges and their status**

44. A number of the proposals of the Draft Amendments on judges deserve to be welcomed – it concerns, for example, functional immunity of the judges, introduction of requirements to the candidates to High Court and High Administrative Court judges, etc. The more problematic provisions are discussed below.

45. Article 28 (amending Article 136) deals with the appointment of judges. The thrust of the amendments is to depoliticise the appointment process by removing the role of the Assembly and by reducing the role of the President to a ceremonial one of appointing the nominees of the High Judicial Council (HJC) in the case of the most senior judges. It needs to be clarified whether and to what extent the President may disagree with the candidates proposed by the HJC; such disagreement should not, in principle, relate to the personalities of the candidates, and in any event the President’s decision should be well-reasoned: the President should only keep the power to turn down obviously inappropriate candidates.

46. This Article also sets requirements for the candidates to the position of a judge of the HC or the HAC. Compared to the existing Article 136 p. 5 the new provisions are more detailed; however, there is no requirement that a candidate should graduate from the School of Magistrates, which is quite strange given that Article 50 concerning the appointment of the prosecutors contains such a requirement which applies even to lower-level prosecutors<sup>23</sup>.

47. As to the lower courts’ judges, the eligibility requirements for these positions seem to be fairly minimal and not very different from the existing regulation (see p. 5 of the draft Article 136). The procedure of appointment is not described at all. It is recommended to fix in the

<sup>22</sup> See CDL-AD(2014)010, cited above, §§133-134

<sup>23</sup> Absence of this criteria may be explained by the transitional provisions; their implementation may create too many new vacancies, and there will be not enough School of Magistrate to fill them in. Probably, this requirement – that aspiring candidate to a judge position have to graduate from the School of Magistrates – may enter in force not immediately but after a certain lapse of time.

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Constitution the general principles governing the process of appointment of judges by the HJC, namely that the judges are appointed on the basis of a fair competition, that the appointment procedure should be transparent, based on a public call for candidates, that it should ensure selection of the most qualified and reputable candidates, etc. The details of the appointment procedure may be further regulated in the law.

48. The Draft Amendments are equally silent on the procedure for the appointment of judges of the Administrative Court of First Instance (Articles 27 and 28) and other specialized courts, the organization of these bodies and their independence. The question arises to what extent Article 28 (amending Article 136) is applicable to the appointments of the administrative and other specialized judges. That should be made clear.

49. Article 29 (amending Article 137) guarantees the immunity of the judges for the opinions expressed and decision taken in performing their professional functions; however, it should contain an exception covering criminal behaviour of a judge (such as the deliberate adoption of an unlawful decision as a result of corruption, personal interests or animosities, etc.).

50. Article 29 mentions the “disciplinary liability” of a judge but does not say that a judge could be removed from office for a serious disciplinary breach. At the same time Article 31, amending Article 139 and applicable to the HC and HAC court judges stipulates that a HC or HAC judge may be removed from office as a result of a disciplinary procedure. It is understood that disciplinary procedures could also lead to the removal of a lower court judge, but that should be specified, especially in the light of the provisions of Article 30 (amending Article 138) which proclaims that “the time of stay in office for judges cannot be restricted”. It is recommended that the above provisions should be harmonised.

51. Next, this Article repeats the existing provision in Article 138 of the Constitution that a judge’s salary and benefits cannot be reduced but proposes to add the proviso “except in cases of a sanction given to the judge”. This is presumably intended to allow for the reduction of a judge’s salary or benefit as part of a disciplinary sanction, but if so it would be desirable that the circumstances in which such a sanction might be provided for should be specified. In addition this constitutional provision should not be so categorical and provide for a possibility of reduction of the salaries of judges in times of a major economic crisis or other national emergency; what is important is that individual judges or judges as a group are not singled out, and that the reduction of their salaries and benefits is not used as a “punishment” in disguise, which might threaten their independence.<sup>24</sup>

52. Article 31 (amending Article 139) speaks of termination of office of HC and HAC judges. Where a judge is removed the mandate for his or her replacement is to be the same as the unexpired term of the removed judge. While this is logical in the case of a CC judge because of the necessity to preserve the system of replacing one third of the judges every four years there is no logic to this proposal in the case of ordinary judges who should be appointed for the full period of 12 years or for life tenure as appropriate to the applicable conditions of appointment.

53. Article 36 (amending Article 143 of the Constitution) provides that mandate of a judge shall be incompatible with “other compensated professional activity, unless otherwise provided by law.” First of all, the wording of the article (the words “unless otherwise provided by law”) seem to provide extensive discretion to the legislator, while containing no indication regarding possible allowed exceptions. At the same time usual exceptions, such as academic, non-for-profit activity

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<sup>24</sup> See CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.3, and CDL-AD(2010)038, Amicus Curiae brief for the Constitutional court of “The Former Yugoslav Republic of Macedonia” on Amendments to several laws relating to the system of salaries and remunerations of elected and appointed officials, §§16-20

and other similar exceptions should be applied. Furthermore, similarly to the Article 21 (amending Article 130), prohibition on political activity, whether compensated or not, should be added.

### 3. Reform of the High Judicial Council

54. Article 40 (amending the current Article 147) deals with the new High Judicial Council (HJC). The new HJC includes 6 judicial members and 5 lay members, the latter elected by the Assembly by a 3/5<sup>th</sup> majority. This composition is acceptable, especially provided the Assembly's vote is "based on the proposals from the respective structures and the opinion of the Justice Appointments Council". The Venice Commission also notes that the Chairperson is elected from amongst the lay members (see p. 5). In its opinion on Montenegro<sup>25</sup> the Venice Commission held as follows:

*"It is very positive, as part of the balance sought, that the President of the Judicial Council will be elected by the Judicial Council itself by a two-third majority among its lay members."*

55. The Venice Commission observes that the current ruling coalition has the necessary qualified majority needed under the Draft Amendments to elect lay members of the HJC. The Venice Commission recalls in this respect its remark in an opinion concerning the Media Council in Hungary:<sup>26</sup>

*"[...] In normal circumstances, the purpose of imposing an obligation for a qualified majority is to ensure cross-party support for significant measures or personalities. However, where the super-majority requirement is introduced at the initiative of a political group having that supermajority, this rule, instead of ensuring pluralism and political detachment of the regulatory body, in fact "cements" the influence of this particular group within the regulatory body and protects this influence against changing political winds. [...]"*

The question is whether, in the current political context, the procedure of election of the lay members of the HJC secures pluralistic composition of the Council. Probably, this question might be addressed by the implementing legislation, which should ensure that the nominations of candidates are free, to the maximum extent possible, from political influence.

56. Article 41 (adding Article 147/a) gives the Council very substantial powers, including appointing, evaluating, promoting and transferring judges, deciding on disciplinary measures, proposing candidates for the HC and the HAC, approving the rules of judicial ethics and monitoring their observation, directing and managing the administration of the courts, proposing and administering the budget, and the strategic planning for the judicial system as well as reporting to the Assembly on the state of the judicial system. It is obvious that the proper organisation of all these functions will require both a system of sub-bodies of the Council as well as an administration which should be headed by a chief executive answerable to the Council.

57. It is recommended to add certain basic principles governing the procedure of election of the HJC. Thus, it is not clear how many candidates the nominating bodies are required to put forward in each category. It is desirable to guarantee the *plurality of candidates* at this stage,

<sup>25</sup> CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §22

<sup>26</sup> CDL-AD(2015)015, Opinion on Media Legislation (ACT CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, §64

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and provide for an *open call* for candidates. The Constitution itself should not necessarily be overly specific on these points; the general principles might be further developed in the implementing legislation.

58. From the terms of Article 56 it appears that the JAC is required to rank the candidates leaving the actual choice to the Assembly. It is thus understood that the opinion of the JAC is not binding on the Assembly; it becomes decisive only if the Assembly twice fails to reach the required 3/5th majority (it is understood that the Draft Amendments here speak of the candidates ranked highest in the “second selection”, but this is not entirely clear and should be clarified).

59. A possible objection to this arrangement is that if the candidate ranked highest by the JAC has the support of just over one third of the members of the Assembly that minority simply by blocking the majority can get their own candidate elected in the end, which, arguably, is not a very democratic solution. The same objection could, however, be made about any option to require a qualified majority.

60. The draft provides that the Assembly is to vote separately for each group of candidates. From each of the groups of candidates only one successful candidate is to be selected with the exception of the law professors (from this category two are to be elected). It is not clear what is the actual mechanism by which the Assembly can choose two candidates by a qualified majority unless each deputy is to have two votes (probably, this more detailed regulation might be left for an organic law).

61. It would be advisable to add at least certain requirements to the candidates to the positions in the HJC (for both judicial and lay members), in order to ensure that people of certain public standing and professional experience are elected.

62. The role of the Minister of Justice in the HJC should be clarified and reduced. First of all, the Venice Commission recalls its earlier recommendation in an opinion concerning Albania<sup>27</sup> which reads as follows:

*“The presence of the Minister of Justice on the Council is of some concern, as regards matters relating to the transfer and disciplinary measures taken in respect of judges at the first level, [and] at the appeal stage [...]. [I]t is advisable that the Minister of Justice should not be involved in decisions concerning the transfer of judges and disciplinary measures against judges, as this could lead to inappropriate interference by the Government.”*

Under the Draft Amendments the Minister will participate in the work of the Council as an “observer”; at the same time s/he plays an active role with regard to the HJC (for instance, he may initiate the investigation into disciplinary misconduct against judges). If the Minister is to have powers to initiate proceedings against judges, it should be made clear that he plays no further role at any meeting of the Council at which the matter is discussed, even as an observer (while he may present a case as a “party”). In principle, the Minister may be provided with a right to initiate disciplinary proceedings against judges; however, in such a case the ministerial request should be addressed to the High Inspectorate (for more details see below). Finally, if the Minister initiates proceedings against a judge, the Minister should not sit as an *ex officio* member of the Disciplinary Tribunal (a proposal which is criticised by the Venice Commission in more general terms as well – see below), which reviews the disciplinary sanctions applied by the Council.

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<sup>27</sup> CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §16

63. Pursuant to Article 40 (amending Article 147 p. 6) the Chair of the Council is to be elected by a qualified majority. If, after two attempts, this majority is not reached, a simple majority will suffice. The problem about this arrangement is that it provides no incentive to a bare majority to find a candidate capable of getting the necessary two thirds' support. The solution is workable but cannot really be described as providing any real incentive towards building a consensus if this is the intention behind the proposal.

64. Article 44 (amending article 147/ç) should be amended providing clearer criteria for allowed exceptions of compensated professional activity compatible with the mandate of a member of the HJC. Furthermore, similarly to Article 36 above, this should maintain the existing prohibition on political activity, whether compensated or not.

#### **4. Newly created bodies: the Justice Appointments Council, the Disciplinary Tribunal, the High Inspectorate of Justice**

65. As a preliminary remark, the Venice Commission notes that the Draft Amendments introduce several new bodies which are supposed to control each other. However, this complicated institutional scheme may have an unintended consequence: it creates an air of mistrust which risks affecting the public esteem of the judiciary, which is already quite low. In addition, creation of so many new bodies will require a mass recruitment of legal professionals while the pool of potential candidates possessing necessary education, training, experience and independence may be fairly limited in such a small country as Albania.

66. Indeed, some level of institutional complexity is needed in order to avoid conflicts of interest and introduce checks and balances. For example, in disciplinary proceedings a person who initiates the inquiry should not decide on the case and should not sit on an appeal panel. However, this does not always require creating special institutions.<sup>28</sup> The same may be achieved by splitting the functions within the same body or introducing conflict of interest rules. Again, the necessary checks and balances may be achieved by pluralist internal composition of the single body, and not necessarily by creating external controlling institutions. The Venice Commission would recommend to the Albanian legislator to revisit the institutional design of the reform and decide whether the number of bodies regulating the judiciary might be reduced.

67. Finally, it was explained to the delegates of the Venice Commission that the creation of the new constitutional bodies would not automatically terminate the mandate of the already existing bodies, for example the Inspectorate already existing within the Ministry of Justice which deals with the inspections within the judiciary, as well as the High Inspectorate of Declaration and Audit of Assets (HIDAA). In the opinion of the Venice Commission, in order to avoid parallelism it is better not to have different bodies with similar or overlapping functions.

##### **a. The Justice Appointments Council**

68. Article 56 (adding Article 149/b) proposes to establish a Justice Appointments Council (JAC), an *ad hoc* body which is entrusted with the function of advising “on the fulfilment of legal

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<sup>28</sup> That being said, creation of a new institution is not problematic in itself; in CDL-AD(2003)012, Memorandum: Reform of the Judicial System in Bulgaria, §15, the Venice Commission reasoned as follows: “[...] Any action to remove incompetent or corrupt judges had to live up to the high standards set by the principle of the irremovability of the judges whose independence had to be protected. It was necessary to depoliticize any such move. A means to achieve this could be to have a small expert body composed solely of judges giving an opinion on the capacity or behavior of the judges concerned before an independent body would make a final decision.”

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requirements and professional and moral criteria<sup>29</sup> of the lay members of the HJC, the HPC, of the candidate for Prosecutor General as well as the candidates for two thirds of members of the Constitutional Court. Several comments are called for in respect of this new body.

69. The creation of the JAC complicates the structure of the judiciary and is aimed at reducing the freedom of choice of the constitutional bodies involved in the appointment process. The composition of this body needs to be examined more closely. In the proposed system of appointments the JAC, a very small elite body, is placed in a very powerful position. A majority of its eleven members are closely linked to the judiciary: six of them represent judges<sup>30</sup>, two others represent prosecutors, one represents the executive (the Minister of Justice) and the remaining two represent other legal professions (the President of the Bar and the President of the High Judicial Council which is elected from the lay members of the High Judicial Council and is not therefore a judge). On the one hand, such composition aims at protecting the JAC from political influence; at the same time, it increases the risk of corporatism since members related to the judiciary are in net majority. However, since five members of the JAC are not directly related to judges, they may provide for an element of checks and balances in making the appointments provided that important decisions within the JAC are taken by a qualified majority in order to ensure that “judicial members” cannot simply outvote the non-judicial ones.

#### b. The Disciplinary Tribunal

70. Article 49 (adding Article 147/f) provides for creation of the Disciplinary Tribunal of Justice (DTJ), which is supposed to act as a disciplinary instance in respect of the members of the bodies which themselves oversee the judiciary and the prosecution – the HJC, the HPC, the High Inspectorate of Justice (HIJ), the Independent Qualification Commissioners (the IQC) and their staff. It is, in addition, a body which hears appeals against disciplinary measures imposed by the HJC and the HPC in respect of the judges and prosecutors.

71. First of all, the presence of the Minister of Justice and of the Prosecutor General in this body is problematic, if it is designed to be a sort of a “court” overseeing non-judicial bodies. In addition, the presence of the three oldest members of courts is not necessarily the best solution: the oldest member might be the most recently appointed and not necessarily the most experienced. A better option if long experience were thought to be of advantage would be to appoint the longest serving member of the court in each case.

72. Commissioners working in the IQC will also be reviewed by the DTJ; however, their inclusion here seems problematic since the Commission has the function of evaluating all the judicial members of the Tribunal. Perhaps the possible solution would be to provide that members of the IQC cannot be subjected to the jurisdiction of the DTJ until after the members of the DTJ themselves have been evaluated by the IQC. For more details about the question of appeal instance against the decisions of the IQC see below. In any event, it is essential that the Commission be subject to disciplinary liability since there will be persons with a strong interest in corrupting its members.

73. According to article 49, “the appeals against decisions of the Disciplinary Tribunal shall be adjudicated by the Constitutional Court “; at the same time, the President of the Constitutional Court an *ex officio* member of the Disciplinary Tribunal and, in addition, *ex officio* Chairperson of this body. This situation creates a conflict of interests. Similar remark may be made concerning the presence of the Prosecutor General as an *ex officio* member of the Disciplinary Tribunal,

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<sup>29</sup> It is understood that the JAC’s powers relate to the candidates to the respective positions, but not to the sitting members of the bodies concerned. In other words, the JAC has no disciplinary/evaluation powers but only intervenes in the process of appointments, as its name suggests. This should be made clearer.

<sup>30</sup> It would also make more sense to appoint the longest serving rather than the oldest judges to the JAC.



since this is the very body which may apply disciplinary liability to the Prosecutor General.

c. High Inspectorate of Justice

74. Article 45 (adding Article 147/d) introduces the High Inspectorate of Justice (HIJ), a full-time body which will have the power of “accuser” in the disciplinary proceedings and which will also be responsible for the “inspections” of the courts and prosecution offices.

75. The first question which appears is whether the creation of the separate Inspectorate is really necessary, given the human and financial resources needed for its proper functioning.

76. Next, the composition of this body increases the risk of corporatist approach to disciplinary liability and inspections. This body will be composed solely of judges and prosecutors; the lay element is almost completely absent from the Inspectorate. Indeed, a certain number of disciplinary investigations may be initiated by the Minister of Justice (see p. 9 of Article 147/d); however, it is unclear whether the request of the Minister to start an investigation will always end with a referral of the case to the HCJ with a “bill of indictment”. In essence, initiation of the disciplinary proceedings against judges and prosecutors will be essentially in the hands of their colleagues. Probably, the functions of the HIC could be transferred to the HCJ in order to simplify the system and add a lay element there<sup>31</sup>.

77. If the legislator maintains the proposal to create a separate HIJ,<sup>32</sup> its establishment should be coordinated with the disciplinary function of the HJC (see Article 41), and with the power of the Minister of Justice to initiate the investigation of disciplinary misconduct against judges (see Article 40). There is the risk that results of the internal inquiry adopted by the HIJ anticipate and condition the decisions to be adopted by the HJC. It will be a task of organic legislation to avoid possible confusions and interferences of activity.

78. The HIJ is also to be responsible for “inspecting” the courts and prosecution offices. It is not clear what this inspection consists of since it is not mentioned elsewhere in the Draft Amendments. It is not clear whether it is the same as the “evaluation” for which the HJC is responsible. The Venice Commission recommends to keep the investigation of disciplinary violations separate from any process of evaluation which is concerned primarily with competence rather than misconduct, and which reveals very often not a personal misbehaviour but a general malfunctioning of the system.

79. Under the amended Article 147 p. 4 the Minister of Justice, as a non-voting member of the High Judicial Council, has the power to initiate disciplinary proceedings against judges. Draft Article 148/a p. 4 gives the Minister of Justice, as a non-voting member of the High Prosecutorial Council, a power to initiate disciplinary proceedings against a prosecutor. Finally,

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<sup>31</sup> Thus, for example, all complaints about the judges’ misbehaviour may be addressed to the Chairperson of the HCJ who will then distribute it amongst members on a random basis. The member of the HCJ who received a complaint would have the right to investigate into the allegations, and, in case the complaint is serious, refer the case to a panel within the HCJ for a decision. The “investigating” member will thus also play a role of a filter and dismiss clearly ill-founded complaints; he or she will have investigative powers but will not sit on the panel which takes the decision on the merits, in order to avoid the conflict of interest. In addition, the power to bring a disciplinary case to the attention of the HCJ might be given to some external actors, such as the Minister of Justice and/or to the presidents of the courts.

<sup>32</sup> Which is also a possible solution; thus, in CDL-AD(2014)032 the Venice Commission observed that “the proposed system [which] provides for a clear division of tasks between the body in charge of investigating (the High Council of Justice) and the body in charge of deciding on the imposition of disciplinary sanctions (Disciplinary Board) is in line with international standards” (CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §71

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the proposed new Article 147/d p. 9 contains the power of the Minister of Justice, as a non-voting member of the Inspectorate, to request the initiation of investigation of disciplinary misconduct against a judge or a prosecutor. Having three partly-overlapping provisions is confusing and creates a lack of clarity as to whether the request should be made to one or other Council or to the Inspectorate.

80. Furthermore, the presence of the Minister of Justice in different disciplinary bodies creates a potential for a conflict of interests. Thus, under Article 45 (adding Article 147/d) the Minister of Justice is to attend the meetings of the Inspectorate as an observer. However, if the Minister has a power to initiate investigations he should not be participating in the meetings of the body which carries them out, even as an observer. Probably, he might present his views as a party before the Inspectorate, but should play no role whatsoever in the deliberations. Later in the Draft Amendments the Minister turns up again as a member of the appellate body deciding on appeals concerning disciplinary liability (Article 147/f p. 2) even though he may have initiated the investigation or performed the inspection in the case of complaints against the Inspectorate itself (Article 147/e). This is inappropriate and must be changed.

81. In addition, draft Article 147/d p. 9 provides for complaints against members of the two Councils and the Prosecutor General. It also seems highly inappropriate that the Minister is given the power to make complaints against two Councils which he attended as an observer. Similarly, the Minister of Justice conducts “inspections” in respect of the members of the Inspectorate (see Article 47, adding Article 147/e) which also seems inappropriate given that s/he sits as a non-voting member in the Inspectorate (draft Article 147/d p. 9), and is a voting member *ex officio* of the Disciplinary Tribunal (draft Article 147/f p. 2) which examines disciplinary cases in respect of the members of the Inspectorate (see Article 147/f).

82. In sum, it seems necessary to carry out a thorough review of the proposed role for the Minister of Justice in these new arrangements so as to avoid conflicts of interest or even the appearance that the Minister can put pressure on bodies which are intended to have an independent role in adjudication on such important matters.

83. Article 46 (adding Article 147/dh) deals with the termination of the mandate of members of the Inspectorate. Here the provision that replacements are to be for the unexpired residue of the term of office of the person replaced is probably logical since it seems to be envisaged that the Inspectorate is a body appointed for a fixed term to be replaced by a new team of inspectors at the end of that term. However, the provision that the body which appoints a member also replaces that member, which has been copied from the other analogous provisions, needs some adjustment since the rules providing for the Assembly elections involve the election of multiple candidates which is not the case where a single person whose mandate is terminated is to be replaced.

##### **5. The Prosecutor’s Office, the High Prosecutorial Council and the Anti-Corruption Prosecutors**

84. Article 50 makes some amendments to Article 148 of the Constitution which establishes the Prosecutor’s Office. Under the new draft the Prosecutor’s Office is to be an “independent” body and is to function on the principle of decentralisation, according to the law. It seems that what is meant by this is primarily the *internal* independence, i.e. that there is to be no hierarchical subordination between higher and lower prosecutors in relation to the conduct of specific cases. This interpretation is supported by the subsequent draft Article 149, which, in dealing with the Prosecutor General’s powers, provides that he or she “issues only written general guidance to prosecutors of the Prosecutor’s Office”. However, “independence” may also mean independence from the executive (the *external* independence). The Commission observes in this

respect that “there is a widespread tendency to allow for a more independent prosecutor’s office, rather than one subordinated or linked to the executive.”<sup>33</sup> The Constitution should specify more clearly which type of the prosecutorial “independence” it proclaims (probably both, the “internal” being labelled “decentralisation”).

85. If the model of internal independence is to be adopted, it will be necessary to ensure in the organic laws a high degree of transparency so that decisions of prosecutors can be objectively evaluated, and, if necessary, appealed against.

86. Article 50 (amending Article 148) establishes eligibility criteria for the candidates to the position of prosecutors: they must have graduated from the School of Magistrates and must have passed an evaluation and audit of their assets and their background. While these proposals are generally welcome they may need some further clarification. For example, the reference to background may need to be spelt out further (probably, in line with the criteria for the vetting developed in the Annex – see below).

87. Article 51 (adding Article 148/a) provides for the creation of a separate High Prosecutorial Council. In different countries there are different models which permit to the management of appointments and disciplinary liability of prosecutors, and the creation of a separate Prosecutorial Council is one of them. However, to have a freestanding Council for the prosecutors is a costly option for Albania; another avenue is to have a joint Judicial and Prosecutorial Council (with separate chambers, if necessary)<sup>34</sup> which would include representatives of judges, of prosecutors, and of other legal professions (lay members). That being said, creation of two separate councils is definitely a legitimate option, and may even be preferable in countries with a strong prosecution service and weak judiciary, since the presence of the prosecutors in the joint Council may be perceived as a threat to the independence of judges.

88. Article 52 (adding Article 148/b) lists the functions of the High Prosecutorial Council. With regard to the responsibilities of the Council, the function of drafting strategic plans and reporting publicly to the Assembly (see Article 52, adding Article 148/a), which are also functions of the Prosecutor General (see Article 54, amending Article 149 p. 4 (dh)), presents a problem: the same functions should not be conferred on two different organs. Another question is whether the rules of ethics for prosecutors should be adopted by the High Prosecutorial Council; it is preferable to have them adopted by law.

89. Article 53 (adding Article 148/c) proposes to establish a new Prosecutor’s Office of the Special Anti-corruption Structure (SAS). Creation of such special structure may have a positive effect on the fight against corruption;<sup>35</sup> it is important that the special prosecutors enjoy at least the same independent status as ordinary prosecutors. The relationship between the Prosecutor General and the Special Anti-corruption prosecutors, however, needs to be considered further.

<sup>33</sup> CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §26; see also §§28, 30 and 31.

<sup>34</sup> See CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, §88, where the Venice Commission welcomed the splitting of the Council into two chambers – one for judges and another for prosecutors.

<sup>35</sup> See CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §74

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90. Under Article 53 the prosecutors of the SAS are to be appointed by the HPC for a term of 10 years; it is unclear whether they could be reappointed and whether there are any guarantees as to their employment thereafter. Another question is whether this method of appointment includes the head of the SAS prosecutors' office. There is no specific provision concerning the appointment and the role of the head of this body despite the obviously pivotal importance of his/her functions. There is a provision for the conduct of investigations by the National Bureau of Investigation (which is not mentioned anywhere else in the Constitution) under the direction of the SAS prosecutors. If this is to be workable the NBI should not itself be subject to any outside direction and its role and competencies be specified, at least briefly, in the Constitution.

91. Prosecutors of the SAS are subject to even more stringent requirements before and during appointment; not only must they pass a review of their assets and their background on the equal footing with ordinary prosecutors, but they are subject to periodic reviews of their financial accounts and telecommunications as well as of their close family members. These are probably appropriate provisions given the reportedly high level of corruption in Albania; however, it is not clear why these are the only public officials to which such provisions should apply. Neither the Prosecutor General nor the judges, for example, are subject to any such monitoring on an on-going basis.

92. Article 54 (amending Article 149) deals with the appointment of the Prosecutor General. There are some anomalies in this provision. First, there is a prohibition on the appointee having held a political post or a post in a political party during the previous 10 years. This is a different formula from that adopted for judges (see Article 28 amending Article 136 p. 2), and it is unclear what is the reason for this difference. In any event, the formula used for the Prosecutor General is better than the more rigid solution proposed for the candidates to the judicial positions. It is also unclear whether a "post" in a political party includes membership.

93. Furthermore, it is not clear whether the HPC is required to propose more than one candidate for the office of Prosecutor General to the Assembly. Probably, this provision could stipulate that the election procedure should be transparent, based on an open call for candidates, and that several alternative candidates, ranked by the JAC, should be presented to the Assembly for voting. Finally, while the appointment is to be by 3/5 of the Assembly, there is no anti-deadlock mechanism if this majority is not reached.

#### **D. Transitional provisions**

94. Article 57 of the draft law contains transitory provisions concerning the mandates of existing officeholders in the judiciary and the prosecution service. The transitional provisions provide for existing members of the Constitutional Court to serve out their existing terms, which is appropriate. Their replacements will then serve terms which are intended to be adjusted so as to enable the new constitutional scheme described in Article 15 (Amending Article 125) to come into effect. It needs to be verified whether this provision is consistent with the scheme of Article 15 of the Draft Amendment, in particular with the provision under which one third of the CC is to be replaced every four years.

95. The existing High Council of Justice will end its activity three months after the entry into force of the law and the new High Judicial Council (HJC) will be elected. In the specific Albanian context, given the radical restructuring of the Council and the conferral of substantial additional powers on the newly constituted Council (cf. to the existing Article 147), this situation might be arguably distinguished from that in relation to which the Venice Commission criticised a proposal for the early termination of the mandate of the Judicial Council in Georgia as an interference with the judicial power and an attempt to achieve, under the pretext of a reform, "a

complete renewal of the composition of a judicial council following parliamentary elections”.<sup>36</sup>

96. Furthermore, under the proposed draft Article 179 p. 6 chances are that the Prosecutor General will not complete his original mandate, since he has to leave his office as soon as the new Prosecutor General is elected under the new rules. The Prosecutor General is not protected by the tenure in the same way as the sitting judges are, and his replacement may arguably be justified by the reorganisation of the system of appointments and the modification of the role of the Prosecutor General (namely the “decentralisation” of the whole system). However, the replacement of the Prosecutor General is definitely not a matter of necessity and maintaining the sitting Prosecutor General until the expiry of his mandate would be acceptable. In addition, it seems to be strange to adopt constitutional amendment aiming at appointing former Prosecutor General as one of the judges of court of appeals.

### **E. Vetting of the sitting judges and prosecutors**

97. Articles 58 et seq. add to the Constitution an Annex entitled “Transitional Qualification Assessment of Judges and Prosecutors” which provides for the process of vetting (“qualification assessment”) of all sitting judges and prosecutors by specially created Independent Qualification Commissions (IQC). This is probably the most radical proposal of the Draft Amendments which requires particular attention.

98. The necessity of the vetting process is explained by an assumption – shared by nearly every interlocutor met by the rapporteurs in Tirana – that the level of corruption in the Albanian judiciary is extremely high and the situation requires urgent and radical measures. The question is whether this wide consensus creates a sufficient basis for subjecting all the sitting judges (including the honest ones) to re-evaluation, irrespective of the specific circumstances of each individual judge. This is a question of political necessity and the Venice Commission is not in a position to pronounce on it. It must be remembered, however, that such radical solution would be ill-advised in normal conditions, since it creates enormous tensions within the judiciary, destabilises its work, augments public distrust in the judiciary, diverts the judges’ attention from their normal tasks, and, as every extraordinary measure, creates a risk of the capture of the judiciary by the political force which controls the process.

99. The Venice Commission has recently had occasion to examine a very similar situation in Ukraine.<sup>37</sup> In that case the Commission’s opinion was as follows:

*“72. [...] [The] representatives of the authorities gave detailed explanations as to the purpose of this provision. They underlined the major problems both with corruption and incompetence among the judiciary which are a result of political influence on judges’ appointments in the previous period. In addition, the representatives of the authorities also emphasised almost complete lack of public confidence in either the honesty or the competence of the judiciary. According to the representatives of the authorities, in these circumstances, the choice was between dismissing all the judges and inviting them to reapply for their positions (which would not be preferable) or assessing them in the manner now proposed by the transitional Article 6.*

<sup>36</sup> See CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, §§67 et seq.; but see also the development of the Venice Commission position, especially as regards the replacement of the *ex officio* members in the reformed bodies in CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §§71 – 75.

<sup>37</sup> CDL-AD(2015)007, Joint opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine

*73. If the situation is as described by the representatives of the authorities, it may be both necessary and justified to take extraordinary measures to remedy those shortcomings. Such extraordinary measures should indeed be aimed at identifying the individual judges who are not fit to occupy a judicial position. In this respect, dismissal of every member of the judiciary appointed during a particular period would not be an appropriate solution to the problems indicated by the authorities. That is particularly so in the case of judges who were appointed in a lawful manner in a country which had a democratic system, although imperfect in many respects and allowing too great a political influence in the appointment of judges.*

*74. However, such measure as the qualification assessment as provided for in transitional Article 6 should be regarded as wholly exceptional and be made subject to extremely stringent safeguards to protect those judges who are fit to occupy their positions.”*

100. The Venice Commission believes that a similar drastic remedy may be seen as appropriate in the Albanian context. However, it remains an exceptional measure. All subsequent recommendations in the present interim opinion are based on the assumption that the comprehensive vetting of the judiciary and of the prosecution service has wide political and public support within the country, that it is an extraordinary and a strictly temporary measure, and that this measure would not be advised to other countries where the problem of corruption within the judiciary did not reach that magnitude.

101. The vetting process is described in an Annex to the Constitution; this technique is legally possible but rather undesirable, as the Annex is very lengthy and not intended to be a permanent feature of the Constitution. If it is to be done in this manner there should be a provision whereby the Annex would cease to be part of the Constitution on a specified date in the future and would be omitted from any texts of the Constitution published after that date.

102. The “expiry date” for the Annex is not very clear either. The Venice Commission notes that under Article 61 of the Draft Amendments the IQC’s mandate will end on 31 of December 2019. However, the duration of the mandate of the IQC may be prolonged by a simple majority of the Parliament (see the last phrase of Article 61). This is a potentially dangerous norm: first, it creates a risk of transformation of the vetting process into a *de facto* permanent arrangement, parallel to the ordinary accountability mechanisms. The Draft Amendments should make it clear that once a sitting judge passes through the vetting, his/her accountability would be further regulated by the ordinary rules contained in the Constitution and in the implementing legislation. The mandate of the IQC might be prolonged only if the vetting process has not been completed for objective reasons (i.e. not all of the sitting judges have passed through it). Second, the possibility of extending the mandate may affect the independence of the commissioners: it is well known that the eventual prolongation or reappointment makes office holders more compliant vis-à-vis the authority which decides on it. So, the conditions in which the mandate of the commissioners is prolonged should be described in the law, and this decision should belong to a larger majority.

### **1. Limitations of the rights in the course of the vetting process from the standpoint of the Albanian Constitution**

103. Suspending or dismissing a large number of judges may potentially enter into conflict with their permanent tenure (see Article 138 of the current Constitution) and with the existing constitutional provisions for removal from office (see Article 147 p. 7 of the current Constitution)<sup>38</sup>, and in the case of officeholders other than judges may be inconsistent with the

<sup>38</sup> The grounds for dismissal of judges as a result of the vetting process are not the same as the grounds for dismissal under the current legal regime. Thus, failure to prove legitimate origin of property may not be tantamount to a

terms on which they have been appointed to their positions. The question is whether it is a breach of European and domestic legal standards to make such a provision, even by way of a constitutional amendment.

104. From the constitutional perspective this question is addressed, at least to a certain extent, by Article 59 of the Draft Amendments, which stipulates that the application of a whole range of provisions of the Albanian Constitution is limited “to the extent necessary to give effect to Part Eighteen of the draft”. Again, it is unclear whether this limitation exists only for the duration of the transitory provisions, and whether these transitional provisions last as long as the mandate of the IQC set in Article 61 lasts. Furthermore, it is unclear to what extent the “transitional provisions” would limit application of other constitutional provisions not mentioned directly in Article 58. This is not an idle question – for example, under Article 61 p. 3 the commissioners (members of the IQC) and their staff waive some of their privacy rights, which are normally protected by Article 36 and, to a certain extent, by Article 37 of the current Constitution. This must be clarified.

105. In this context the Venice Commission refers to Article 12 of the Draft Amendments (adding a new paragraph to Article 131 of the existing Constitution), which provides that the Constitutional Court will have no power to review the provisions enacted as constitutional amendments. Seemingly, the intent behind Article 12 was to ensure that the specific limitations of the rights of the sitting judges, introduced by the Annex, are not contested, and that the transitional provisions contained in the Annex take precedence over the norms of the existing Constitution, especially those contained in Chapter II (“Personal Rights and Freedoms”). However, the position which the Constitutional Court might take in this respect is not known: after all, constitutional provisions related to privacy, burden of proof etc. are not formally abrogated, they remain in the text of the Constitution and, in the opinion of the Commission, should apply to the judges as well, even with the qualifications and limitations introduced by the transitional provisions for the purposes of the vetting exercise.

## **2. Limitations of the rights in the course of the vetting process from the standpoint of the European Convention of Human Rights**

106. Even if, as a part of the vetting process, certain rights guaranteed by the Albanian Constitution may be limited or qualified, Albania is bound by the ECHR and cannot avoid supervision by the European Court in Strasbourg. Article 15 of the European Convention gives the member-States the right to make derogations “in time of emergency”,<sup>39</sup> however, it is difficult to envisage the possibility that Albania makes reference to this provision while the country is not confronted by war or other public emergency threatening the life of the nation. Indeed, this is true only as far as the European Court continues to give a very strict interpretation of the text of this provision, and the very notion of “public emergency” is subject to interpretation.

- a. Does the vetting process affect the “independence” of the whole Albanian judiciary?

107. The first question in this respect is whether the implementation of the evaluation process generally compromises the independence of all the sitting judges in the country. If so, decisions they render would not be in compliance with Article 6 of the European Convention which

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“disciplinary offence”; it is further unclear whether in the current system regular contacts with politicians entail any legal consequences for a judge.

<sup>39</sup> Article 15 is entitled “Derogation in time of emergency”: “1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”

guarantees everyone the right to fair trial by an “independent and impartial tribunal”.<sup>40</sup> To the extent that the re-evaluation is a general measure, applied equally to all judges, decided at the constitutional level, and accompanied by certain procedural safeguards and not related to any specific case a judge might have before him/her, the Venice Commission does not see how this measure may be interpreted as affecting the judge’s independence to the extent incompatible with Article 6. This does not, however, exclude the possibility that the vetting procedure might on a particular occasion be abused in order to influence the judge’s position in a particular case: if such allegations were proven, it might require the reopening of that particular case since the judge would not be an “independent tribunal”.

b. Does the vetting process affect the right of the judges themselves to a fair trial?

108. The second question is the judge’s own human rights. The European Convention does not guarantee any labour rights; therefore, in principle, the dismissal of a judge as a result of the vetting process would not affect any of his/her substantive rights under the Convention.<sup>41</sup> That being said, there is Article 6 of the Convention which guarantees the right to a fair trial. Theoretically, dismissed judges may complain that the vetting process breached this provision.

109. The first question to be answered in this context is the applicability of this Article. Article 6 applies only to the proceedings which concern “criminal charges” or “civil rights and obligations”. It is relatively clear that the dismissal of a judge cannot be regarded as a “criminal” sanction, so Article 6 under its criminal limb would not apply.

110. Applicability of the “civil” limb of Article 6 to the vetting process is also open to doubt but is probable. Thus, in the case of *Mishgjoni v. Albania*,<sup>42</sup> which concerned the dismissal of the judge, the ECtHR argued, with reference to *Vilho Eskelinen and Others v. Finland*,<sup>43</sup> that Article 6 § 1 under its “civil” head should be applicable to all disputes involving civil servants, unless the national law expressly excluded access to a court for the post or category of staff in question, and this exclusion was justified on objective grounds in the State’s interest. In that case the applicant’s civil claim was examined by the Supreme Court and the Constitutional Court – hence, the applicant was not excluded by domestic law from “access to a court” and Article 6 § 1 of the Convention was therefore applicable to disciplinary proceedings against a judge.

111. Applicability of Article 6 to the vetting process may call in question some of the institutional arrangements proposed in the Annex. Thus, in *Olujic v. Croatia* the ECtHR found Article 6 applicable to the dismissal of the President of the Supreme Court by the National Judicial Council.<sup>44</sup> Although the Croatian legislation expressly excluded access to court in relation to the decisions of the Judicial Council, the Constitutional Court accepted a constitutional complaint lodged by the President of the Supreme Court and related to his dismissal. In this situation the ECtHR concluded that Article 6 should be applicable since the applicant had been *de facto* given access to a court. Having decided so the ECtHR went further and applied the criterion of “independent and impartial tribunal” to the members of the National Judicial Council.

<sup>40</sup> This Article, entitled “Right to a fair trial”, insofar as relevant reads as follows: “1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly [...]”.

<sup>41</sup> Unless the judge is dismissed for his/her religious beliefs, for expressing his/her opinion or joining an association – in this case a question under Articles 9, 10 or 11 may arise, but such cases will be few. A special case is a dismissal for private behaviour which may be regarded as an interference with the judge’s “private life” protected by Article 8 of the Convention – this scenario will be examined further below.

<sup>42</sup> ECtHR, no. 18381/05, 7 December 2010

<sup>43</sup> ECtHR, GC, no. 63235/00, ECHR 2007-IV

<sup>44</sup> ECtHR, no. 22330/05, 5 February 2009, §35



112. There are other examples of cases where Article 6 was found to be applicable to the procedures ending with a dismissal of a judge<sup>45</sup>. There are also a few opposite examples, where the Court decided that both conditions of the *Vilho Eskelinen* test had been met and Article 6 was not applicable.<sup>46</sup>

113. Finally, the Venice Commission refers to the case of *Baka v. Hungary*,<sup>47</sup> currently pending before the Grand Chamber where the Court decided that in the case of termination of the mandate of the President of the Supreme Court of Hungary as a result of a constitutional reform the judge nevertheless must have had a right of access to a court under Article 6. This case was decided unanimously, and, although it is now pending before the Grand Chamber, and the outcome of the proceedings cannot be certain, it shows that there exists a probability in favour of the applicability of Article 6 to the procedures which may lead to the dismissal of the judges.

114. At present the whole vetting procedure is presented in the Draft Amendments as *not judicial* in nature – thus, removal of a judge from office by the IQC is excluded from the jurisdiction of the ordinary courts (see Article 68 p. 5)<sup>48</sup>. The question remains, however, whether this exclusion “was justified on objective grounds in the State’s interest” (the second prong of the *Vilho Eskelinen*’s test). There is no guarantee that the European Court would agree that Article 6 is not applicable *in casu*.

115. It would be more prudent to assume that Article 6 *is* applicable to the vetting process. In this scenario the absence of the appeal to a judicial body against decisions of the IQC may be problematic. The right of appeal to a court in disciplinary matters follows from the jurisprudence of the ECtHR; thus, in the case of *Albert and Le Compte v. Belgium*,<sup>49</sup> the European Court observed as follows:

*“[...] In many member States of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where Article 6 para. 1 [...] is applicable, conferring powers in this manner does not in itself infringe the Convention [references omitted]. Nonetheless, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6 para. 1 [...], or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1 [...].”<sup>50</sup>*

116. As to the approach of the Venice Commission, traditionally it was favourable to the introduction of the right of appeal to a court against decisions of the bodies deciding on

<sup>45</sup> Thus, in a recent case of *Saghatelyan v. Armenia* (no. 7984/06, 20 October 2015, not final), the European Court found Article 6 applicable because the domestic law did not exclude the access to court specifically (emphasis added) to the judges but rather restricted access everybody in respect of a specific type of administrative act (the President’s decree *in casu*).

<sup>46</sup> See *Serdal Apay v. Turkey*, no. 3964/05, inadmissibility decision of 11 December 2007, concerning a public prosecutor; see also the case of *Özpinar v. Turkey*, 19 October 2010, where the Court implied that Article 6 might be inapplicable in a case of dismissal of a judge, without giving a definite answer to this question.

<sup>47</sup> ECtHR, no. 20261/12, 27 May 2014

<sup>48</sup> The question remains whether the Constitutional Court will have the power to accept individual complaints from the judges, dismissed as a result of the vetting

<sup>49</sup> Judgment of 10 February 1983, Series A no. 58, §29

<sup>50</sup> The Venice Commission sees a certain tension between the Court’s approach in *Albert and Le Compte*, where the Court admitted that the “jurisdictional organs of professional associations” may not necessarily comply with Article 6 of the Convention is their decisions are controlled by a judicial body, and the Court’s approach in *Olujić*, where the requirements of Article 6 were extended to the members of National Judicial Council, which, in essence, might be otherwise regarded as a “jurisdictional organ” of the judiciary.

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disciplinary liability of judges.<sup>51</sup> Turning to the specific case of Albania, the Venice Commission admits that introduction of the right of appeal may be problematic, because all courts, starting from the High Court, will be subjected to the vetting procedure by the IQC, and, quite evidently, they cannot be judges in their own cases. Probably, a possible solution in this situation would be a staged introduction of the right of appeal, where the power to examine appeals is given to the Supreme Court once the vetting has been concluded there.

117. In the Draft Amendments the power to examine appeals against the decisions of the IQC remains with the Appellate Commission.<sup>52</sup> In this case, a formal definition of the Commission as “Independent” will not be sufficient. The legislator will have to ensure that the members of the Appellate Commission enjoy status similar to that of “judges”. The Appellate Commission should have sufficient distance from the body making the decision at first instance (for example, the possibility of joint panels with the substitute members of the First Instance commissions, provided now by Article 68 p. 2, should be excluded). The Appellate Commission should also have appropriate powers vis-à-vis the lower instances, for example, the power to transfer abusive proceedings, to require the lower commissions to take specific fact-finding steps or to observe proper legal procedures. Finally, the procedures before the Appellate Commission should correspond to the “fairness” and “publicity” requirements contained in Article 6 § 1 of the ECHR (but not in §§2 and 3 since the latter only concern criminal trials)<sup>53</sup>. In essence, the Appellate Commission should have basic characteristics of a “court” and give fair trial to the dismissed judges.

118. In the light of the European Court’s approach in *Albert and Le Compte*, it is difficult to say whether to what extent the first instance Commissions must fulfil all the requirements of Article 6 (cf. with the Court’s approach in *Olujčić*). In the opinion of the Venice Commission the most prudent solution would be to extend institutional and procedural guarantees of Article 6 § 1 to the first instance commissions as well and to ensure that all commissioners comply with the requirements of “independence” and “impartiality”, that the cases are heard in adversarial proceedings, expeditiously and fairly, etc.

#### c. Grounds of assessment

119. The vetting process is based on three grounds of assessment of sitting judges/prosecutors: on their assets (Article 63 of the Draft Amendments), on their “background”, i.e. connections with the criminal world (Article 64), and on their “proficiency”, i.e. professionalism (Article 65).

##### i. *The “asset assessment”: the shifting of the burden of proof and the problem of self-incrimination*

120. As regards Article 63 (the “asset assessment”), the IQC will have the power to dismiss the judge (a) if his/her declared assets exceed the amount justified by the legitimate income more than twice, or (b) if the declaration is inaccurate. In both scenarios the presumption will be in favour of the dismissal; it will be up to the judge/prosecutor concerned to prove the legitimate

<sup>51</sup> See, for example, CDL-AD(2014)018, Joint opinion - Venice Commission and OSCE/ODIHR - on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §111

<sup>52</sup> The Venice Commission observes that the Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 stipulate as follows: “Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review.” It may be seen that the UN Basic Principles require examination of appeals by an “independent” but not necessarily “judicial” body.

<sup>53</sup> See Recommendation CM/Rec(2010/12) of the Committee of Ministers of the Council of Europe to member states on judges, where the CM held as follows: “69. Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or [emphasis added] a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate.”

source of his/her assets and give an innocent explanation to the inaccuracies in the declarations.

121. The question is whether this shifting of burden of proof is compatible with the presumption of innocence and the right to remain silent and not to incriminate oneself, contained in Article 6 § 2 of the European Convention.<sup>54</sup> The Venice Commission tends to answer this question in the positive. First, Article 6 § 2 applies to the criminal proceedings, so it would not be normally applicable in cases of dismissals of judges and prosecutors. Second, this guarantee does not cover the exhibition of documents which are at the disposal of the persons concerned. Third, there are multiple examples from other areas of law where a failure to report on certain operations, acts, contacts, etc. entails liability (for example, the fiscal liability attached to the submission of inaccurate or incomplete tax returns). It is reasonable to introduce even more stringent rules for civil servants, including judges and prosecutors.

*ii. The “background assessment” and the judge’s private life*

122. The background assessment (Article 64) is intended to establish whether there has been regular and inappropriate contact with members of organised crime; if so, a presumption in favour of dismissal is established. Again, the person being assessed is required to make a declaration. It is not clear, however, who defines whether a particular persons is a “member of the organised crime”. Should the IQC categorise certain people as such, or this fact should be established on the basis of previous convictions (in Albania or abroad)? These questions should be answered in the implementing legislation.

*iii. Proficiency assessment and the stability of court judgments*

123. The third substantive ground for re-evaluation is the proficiency assessment (Article 65). It seems from the draft that this is to be based on the actual work which has been done by the person assessed. This is the most problematic criteria; if the IQC finds that a judge’s work is clearly sub-standard, what to do with all final judgments rendered by him/her? It is clear that such assessment should not lead to a massive reopening of old cases (otherwise than in most exceptional and rare circumstances). The very fact that the impugned decision had been taken by a judge dismissed for the lack of “proficiency” should not be an automatic ground for the reopening of the case: the claimant must demonstrate convincingly that there has been a fundamental and serious error justifying the reopening and outweighing the principle of legal certainty.

*d. Waiver of privacy rights by the commissioners and the IQC staff*

124. Article 61 p. 3 of the Annex provides for the disclosure of personal information by the commissioners and staff of the IQC; they should agree to a “waiver of the privacy of their communication related to their work for the period of ten years”. In principle, such a waiver appears possible, provided that the implementing law is carefully designed in order to define the scope of this waiver which should be in compliance with the applicable European standards.

**3. Composition of the IQCs and the procedures before it**

125. The Annex establishes quite a complex system of carrying out the qualification assessment by the IQC. The Commission will consist of two Public Commissioners (who play the “prosecutorial” role in the vetting procedures), and between one and three First Instance Commissions, each of which will consist of three commissioners. There will also be an Appeal

<sup>54</sup> This provision reads as follows: “2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”

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Instance Commission. In addition there are to be substitute commissioners both at the first instance and appeal level.

126. The system of alternatives of one, two or three Commissions is confusing. It is unclear why the number of Commissions and commissioners cannot be fixed in the Constitution. The inner structure of the IQC could be simplified.

127. The method of selection of candidates by the 3/5 of the Assembly, at the proposal of the Ombudsman and following a public call for candidates (see Article 61 p. 6) appears reasonable in theory. It is difficult to understand, however, why p. 3 of Article 59 mentions the involvement of the President in the process of selection of the Commissioners, while in Article 61 the nominating power is given to the Ombudsman. Given that the current majority appears to control 3/5<sup>th</sup> votes in the Assembly, it would be more appropriate to give the nominating power to an independent body or an official who is not clearly of the same political colour as the current governmental majority.

128. Article 61 p. 8 mentions the possibility of removal of the members of the IQC by the newly created Disciplinary Tribunal. At the same time, the IQC are supposed to evaluate judges who are members of the Disciplinary Tribunal *ex officio*. The Draft Amendments should provide for another form of accountability of the members of the IQC.

#### **4. Status and mandate of the international observers**

129. Article 60 establishes an “International Monitoring Operation” – a group of foreign experts overseeing the proper functioning of the vetting process and given certain procedural rights within it. Their major function would be to monitor decisions taken by the IQC, examine files of the office-holders subjected to the vetting, and, in the case of “unreasonable” decisions, seek re-examination of the cases by a differently composed IQC. However, the international observers themselves apparently have no power to decide on the individual cases.

130. It is most unusual that a national Constitution introduces in the constitutional system of checks and balances a figure or an organism which is nominated from the outside of the country and which is ultimately responsible not before the democratically elected bodies within the country but before a foreign government or an international organisation. In addition, the existence and proper functioning of this mechanism will depend on the good will of foreign powers and international organisations, and this is not something which a national Constitution may guarantee.

131. On the other hand, if this scheme is approved at the constitutional level it means that it has a wide public support. Provided that there is a clear political undertaking of international partners to assist Albania in this process, and under condition that this temporary scheme will be ultimately replaced with normal mechanisms of the democratic control of the judiciary, such unusual solution may be deemed acceptable.

132. Article 60 is silent about the manner of appointment of the international observers and the duration of their mandate. Probably, the power to *appoint* them could belong to one of the constitutional bodies, for example the President, while the candidates could be *nominated* by a group of “international partners”, coordinated by the European Union. Their mandate should be irrevocable and correspond to the duration of the mandate of the IQC; however, international partners might have the right to request the President to revoke international observers, in the case of gross misbehaviour on the part of the latter.

133. Article 60 p. 2 stipulates that International Observers should have similar qualifications to those required from the Commissioners. The eligibility criteria must be formulated in such a way as to comply with a profile of an “experienced foreign lawyer”.

134. Finally, the exact scope of powers of the International Observers is not clear. It is understood that they will have free access to all the materials at the disposal of the IQC (Article 62 p. 4); at the same time they “may request and present evidence” (Article 60 p. 3). Does it mean that the International Observers will also have some investigative powers, and will be able to obtain proactively evidence from other State bodies and even private persons? This should be clarified.

135. It is not clear equally at what moment an international observer may seek transferral of the case to an “alternative” commission (Article 60 p. 3) or to an “extended appeal commission” (Article 68 p. 2), and how this power corresponds with the power of the parties to the vetting process to appeal decisions of the first instance commissions. In Article 68 p. 2 the second phrase is incomplete.

### III. CONCLUSIONS

136. The Venice Commission expresses its support for the effort of the Albanian authorities aimed at the comprehensive reform of the Albanian judicial system. Such reform is needed urgently, and the critical situation in this field justifies radical solutions. The Draft Amendments represent a solid basis for further work in this direction; that being said, the proposals contained in the Draft Amendments need to be simplified and, at places, clarified; certain elements are to be regulated by an organic law or by ordinary legislation.

137. Amongst the most important recommendations which the Venice Commission might make on the text of the Draft Amendments, are the following:

- The whole institutional arrangements should be revisited and simplified (for example, by renouncing of the idea of creation of a separate Inspectorate); the constitutional amendments (especially on the vetting process) should only set the most important principles, while leaving the details to the implementing legislation;
- It is recommended to clarify who is to decide on disciplinary measures against the Constitutional Court judges; decisions of the Constitutional Court should have a general binding force and the Constitutional Court should keep the power to review at least the procedure of constitutional amendments;
- The role of the Minister of Justice in the High Inspectorate of Justice and the High Judicial Council should be reconsidered with a view to avoiding possible conflicts of interests; generally, institutional arrangements should be revisited in order to remove possible conflicts of interests; the Minister of Justice should not sit in the Disciplinary Tribunal;
- The Constitution should set general principles governing the process of appointment of judges and prosecutors (merit-based selection, open call for candidates, transparent selection procedure, plurality of candidates etc.); the proposed reference in the Constitution to the disciplinary liability of judges needs further clarification;
- The Constitution should clarify the relations between the Special Anti-corruption Structure prosecutors and the Prosecutor General;
- An anti-deadlock mechanism for the election of the Prosecutor General should be put in place; the Prosecutor General should not sit in the Disciplinary Tribunal;
- The composition of the Independent Qualification Commissions and status of its members should guarantee its genuine independence and impartiality;

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judges/prosecutors subjected to the vetting should enjoy basic fair trial guarantees and should have the right of appeal to an independent body;

- The status and conditions of appointment/removal of the international observers should be defined; their powers should be described with more precision (and further developed in the implementing legislation).

138. The Venice Commission understands that the work on the text of the Draft Amendments continues and that a package of the implementing legislation will be prepared in the near future. The Commission expresses its readiness to assist the Albanian legislative bodies in this process.